

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX – ADDITIONS NOT WAIVED – ILLEGAL USE OF COLLECTED TAX FOR VENDOR'S BUSINESS** -- Petitioner's practice of segregating consumers' sales and service tax and subsequently spending same for its own personal use is an illegal use of the State's moneys and clearly does not constitute reasonable cause for waiver of additions to tax as required by W. Va. Code § 11-10-18(a)(1)-(2) [1986]; however, said failure to remit tax does not preclude Petitioner from filing accurate consumers' sales and service tax returns in lieu of the estimated assessment.

**FINAL DECISION**

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, the Director of this Division of the Commissioner's Office issued an estimated consumers' sales and service tax assessment against the Petitioner.

This assessment was issued pursuant to the authorization of the Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the period of January 1, 2000 through March 31, 2003, for tax, interest, through May 31, 2003, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked, July 3, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. See W. Va. Code § 11-10A-8(1) [2002].

Subsequently, written notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

## **FINDINGS OF FACT**

1. During the assessment period Petitioner kept consumers' sales and service tax collected from its restaurant business, rather than remitting same to the Tax Commissioner.

2. Petitioner failed to file consumers' sales and service tax returns after April, 2001.

3. The tax examiner did not accept Petitioner's tax filing amounts prior to April, 2001, but estimated the entire assessment period, using same only as a guide.

4. The administrative law judge directed the Petitioner's representative to prepare new consumers' sales and service tax returns for all tax periods to reflect actual totals, based upon said representative's assurance that he could easily do so.

## **DISCUSSION**

The sole issue is whether Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part, see W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

In this case, Petitioner engaged in the practice of keeping consumers' sales and service tax which should have been remitted to the Tax Commissioner. Said actions are in direct violation of West Virginia tax laws, see W. Va. Code §§ 11-15A-4 and -5; however, said practice does not bar the Petitioner from filing accurate tax returns after the hearing in lieu of tax estimates.

## **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner-taxpayer to show that the

assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter carried the burden of proof in part by filing post-hearing consumers' sales and service tax returns in lieu of the estimated tax figures arrived at by the tax auditor in preparing the estimated assessment.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2002 through March 31, 2003, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for tax, interest, on the revised tax, updated through February 29, 2004, and additions to tax, for a total revised liability.